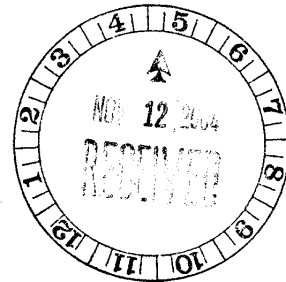


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November 12, 2004

**BY HAND DELIVERY**

The Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
1925 K Street, N.W.  
Washington, D.C. 20423-0001

ENTERED  
Office of Proceedings

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Public Record

RE: Finance Docket No. 34335  
*Keokuk Junction Railway Co.--Feeder Railroad Development Application*  
*--Line Of Toledo, Peoria & Western Railway Corporation Between*  
*LaHarpe And Hollis, IL*  
**Reply to Petitions for Stay**

Dear Secretary Williams:

Enclosed herewith are an original and eleven copies of the Public Version of the "Reply of Keokuk Junction Railway Co. To The Petitions of Toledo, Peoria and Western Railway Corporation and UTU-Illinois Legislative Board for Stay of the Board's October 28, 2004 Decision" to be filed in the above-captioned proceeding. An original and eleven copies of the Highly Confidential Version are also being filed under seal consistent with 49 C.F.R. § 1104.14. A complete copy of either the Public or the Highly Confidential Version of this filing has been served on all required parties of record consistent with whether or not they have executed the confidentiality undertaking prescribed by the Board.

Please acknowledge receipt of the enclosed pleading by date stamping the extra copy of the filing and returning it to the individual making this filing for return to me. If there are any questions about this matter, please contact me directly, either by telephone: (202) 663-7823 or by e-mail: [wmullins@bakerandmiller.com](mailto:wmullins@bakerandmiller.com).

Sincerely,



William A. Mullins

Enclosure

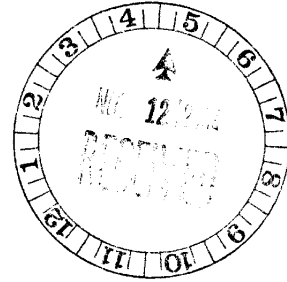
cc: All Parties of Record

**PUBLIC VERSION**  
**BEFORE THE**  
**SURFACE TRANSPORTATION BOARD**

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**FINANCE DOCKET NO. 34335**

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**KEOKUK JUNCTION RAILWAY CO.**  
**--FEEDER RAILROAD DEVELOPMENT APPLICATION--**  
**LINE OF TOLEDO, PEORIA & WESTERN RAILWAY CORPORATION**  
**BETWEEN LA HARPE AND HOLLIS, IL**

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**REPLY OF KEOKUK JUNCTION RAILWAY CO. TO THE PETITIONS OF TOLEDO,**  
**PEORIA AND WESTERN RAILWAY CORPORATION AND UTU-ILLINOIS**  
**LEGISLATIVE BOARD FOR STAY OF THE BOARD'S OCTOBER 28, 2004 DECISION**

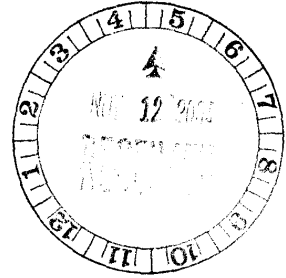
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**Attorneys for Keokuk Junction Railway Co.**

**DATED: November 12, 2004**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

**FINANCE DOCKET NO. 34335**



**KEOKUK JUNCTION RAILWAY CO.  
--FEEDER RAILROAD DEVELOPMENT APPLICATION--  
LINE OF TOLEDO, PEORIA & WESTERN RAILWAY CORPORATION  
BETWEEN LA HARPE AND HOLLIS, IL**

**REPLY OF KEOKUK JUNCTION RAILWAY CO. TO THE PETITIONS OF TOLEDO,  
PEORIA AND WESTERN RAILWAY CORPORATION AND UTU-ILLINOIS  
LEGISLATIVE BOARD FOR STAY OF THE BOARD'S OCTOBER 28, 2004 DECISION**

Keokuk Junction Railway Co. ("KJRY"), applicant in this proceeding, hereby replies to the petition for stay filed by Toledo, Peoria, and Western Railway Corporation ("TP&W") on November 5, 2004, and the petition for stay filed November 8, 2004, by the United Transportation Union – Illinois Legislative Board ("UTU-IL"). Both petitions for stay should be denied.

**SUMMARY**

TP&W and UTU-IL have not demonstrated entitlement to a stay because they have not met the standards set forth in the *WMATC*<sup>1</sup> decision for issuance of a stay. Even if viewed in the light most favorable to TP&W, TP&W has not shown that it will suffer irreparable harm in the absence of a stay. At most, TP&W claims that, based upon speculative traffic that may or may not occur, it might, just might, be entitled to some additional compensation, but potential economic loss does not constitute irreparable harm.

<sup>1</sup> *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977).

UTU-IL's petition should likewise be denied. UTU-IL's unique theory, effectively seeking to force creation of union jobs that do not presently exist, is not supported by precedent or statute, leaving UTU-IL unlikely to prevail on its reconsideration request. Also, TP&W employees will suffer no irreparable harm in the absence of a stay because TP&W employees have performed little or no work on the Line for years. Indeed, the Board's October 28, 2004 decision ("Decision") actually creates new work opportunities that would not otherwise exist for those employees.

The Board's decision set a deadline of January 26, 2005, for closing this feeder line sale. By that date, TP&W's actions will have deprived shippers on the Hollis to LaHarpe line (the "Line") of adequate rail service for more than four years. TP&W's and UTU-IL's petitions unjustifiably seek to prolong that period even further. They should not be allowed to do so. The Decision should be allowed to stand so required public service can be restored.

### **ARGUMENT**

#### **I. The Legal Standard Applicable To A Stay Request**

To justify a stay under the *WMATC* standard, TP&W and UTU-IL must show that –

1. There is a substantial likelihood that they will prevail on the merits of their challenges to the decision;
2. They would be irreparably harmed unless a stay is granted;
3. A stay would not substantially harm other interested parties; and
4. Issuance of a stay is in the public interest.

*See also, e.g., Central Illinois Railroad Company—Operation Exemption—Rail Line of The City of Peoria and The Village of Peoria Heights in Peoria and Peoria Heights, Peoria County, IL, STB Finance Docket No. 34518 (served July 1, 2004), slip op. at 2; Canadian Pacific Railway*

*Company—Trackage Rights Exemption—Norfolk Southern Railway Company*, STB Finance Docket No. 34561, et al., (served Oct. 27, 2004) , slip op. at 3; *New England Transrail, LLC—Acquisition and Operation Exemption—Lines of Boston and Maine Railroad Company*, STB Finance Docket No. 34365 (served July 10, 2003) , slip op. at 2; and *DeBruce Grain, Inc. v. Union Pacific Railroad Company*, STB Docket No. 42023 (served April 27, 1998) at n. 7. Neither petition satisfies these criteria.

## **II. Neither Petitioner Has a Substantial Likelihood of Prevailing on Its Claims**

TP&W is not likely to prevail on the merits of its planned petition for reconsideration. TP&W asserts two grounds on which it claims that it would prevail on reconsideration – a supposed potential new agreement with a shipper that allegedly would constitute changed circumstances with respect to valuation of a portion of the Line and a supposed error by the Board in considering evidence of real estate value. TP&W is not likely to prevail on either of these issues. Similarly, UTU-IL is not substantially likely to prevail on its unprecedented argument that KJRY is required to use TP&W employees to maintain and operate the Line as a condition of acquiring the Line.

TP&W's petition contends that TP&W was within days of signing a contract with a new shipper. Though refusing to give more than hints about the supposed contract or the shipper, TP&W contends that the contract would have yielded it additional annual revenue which, TP&W contends, gives the Canton to Hollis portion of the Line a Going Concern Value ("GCV") not

heretofore present. TP&W claims that KJRY must therefore pay GCV to acquire that portion of the Line and in addition pay NLV for the remainder of the Line.<sup>2</sup>

TP&W's claims of alleged new business are purely speculative. As such, they do not justify reopening of the record so as to apply a going concern valuation. Speculative claims of new revenue sources are not sufficient to justify reversing a Board decision. *See CSX Transportation, Inc.-Abandonment Exemption-In Pike County, OH*, STB Docket No. AB-55 (Sub-No. 622X) (served May 5, 2003), slip op. at 1 (speculation that existing business might expand its plant and provide additional traffic for the line held insufficient to stay effect of proposed abandonment), and *Gauley River Railroad, LLC-Abandonment and Discontinuance of Service-In Webster and Nicholas Counties, WV*, STB Docket No. AB-559 (Sub-No. 1X) (served Oct. 2, 2000) slip op. at 3 and 5 (interested party's claim that it was negotiating a contract to develop traffic on the line held insufficient to justify reopening of abandonment).

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<sup>2</sup> In effect, TP&W is trying again, as it did in its earlier pleadings, to bifurcate the Line into two distinct and separate segments; in effect, withdrawing the portion of the Line that TP&W now claims to want to operate from the scope of the Application. The Application was for the entire Line, excluding the Mapleton Spur, and it was not for two separate segments of the Line or just part of the Line. Just as the Board denied TP&W's previous efforts to bifurcate the Line into two segments, it should deny TP&W's latest attempt to change the scope of the application KJRY filed.

Similarly, an agreement offered by the selling carrier which had not been accepted was held insufficient to support an increased valuation requested by the seller in an offer of financial assistance proceeding. *See Railroad Ventures, Inc.-Abandonment Exemption-Between Youngstown, OH, and Darlington, PA, in Mahoning and Columbiana Counties, OH, and Beaver County, PA*, STB Docket No. AB-556 (Sub-No. 2X) (served Oct. 4, 2000), slip op. at 15. As such, it is completely proper for the Board to value the property at the time of the decision and not on the basis of some speculative future revenue stream from a shipper. *Accord, Antoine v. United States*, 710 F.2d 477, 479-80 (8<sup>th</sup> Cir. 1983); and *United States v. Creek Nation*, 295 U.S. 103, 111 (1935).

TP&W's claim that the Board should have ignored KJRY's valid rebuttal evidence on real estate value likewise will not support a change of the Decision on reconsideration. KJRY asked TP&W in discovery to produce real estate documents. TP&W refused to do so. Accordingly, KJRY's Application included KJRY's best estimate of the nature and value of the real estate at issue. KJRY's testimony stood unchallenged until TP&W filed its evidence in October. There, TP&W's real estate witness Todd N. Cecil rendered a verified statement in which he said that he would, among other things, "critique the valuation included in the Application." TP&W Comments In Opposition at 108 (dated Oct. 16, 2003). This statement by TP&W's own witness refutes any claim that evidence of real estate value wasn't presented until rebuttal.

Of course TP&W challenged KJRY's real estate valuation evidence in TP&W's October filing, producing the relevant deeds (that it had refused to produce in response to KJRY's discovery) along with Mr. Cecil's opinion of the quality of TP&W's title and his statement attacking KJRY's real estate valuation evidence. TP&W Comments In Opposition at 116-118

(dated Oct. 16, 2003). It was completely proper for KJRY to file rebuttal evidence that addressed Mr. Cecil's claims. See *Cheney Railroad Company-Feeder Line Acquisition-CSX Transportation, Inc. Line Between Greens and Ivalee, AL*, 5 I.C.C.2d 250 (1989)(the Board refused to strike an extensive valuation report submitted by the applicant on rebuttal to refute the seller's title claims)("Cheney"). As such, TP&W's argument does not warrant reconsideration of the Board's decision.

UTU-IL also has not shown a likelihood of prevailing on the merits of its claim. UTU-IL has not set forth even one case that stands for the proposition that Section 10907 would require KJRY to use current TP&W employees to perform work over the Line notwithstanding the fact that KJRY has sufficient employees to do the job. The Board's order requiring KJRY to give priority for any new jobs to qualified TP&W employees who formerly worked on the Line was completely consistent with its previous precedent in *Cheney*. As such, UTU-IL's petition should be denied.

### **III. Neither TP&W Nor UTU-IL Will Suffer Irreparable Harm Without a Stay**

The second prong of the *WMATC* test is that the party seeking the stay must show that it will be irreparably harmed in the absence of a stay. TP&W's claims are, in large part, based upon an alleged loss of revenues due to an alleged undervaluation of the Line. UTU-IL's claim is based upon an alleged loss of jobs, notwithstanding the fact that these jobs were lost at least four years ago. Neither TP&W's nor UTU-IL's claims establish irreparable harm.

Boiled down to its essence, TP&W claims that it will be irreparably harmed because the Decision put a potential new contract for a potential new shipper in danger and thus it "will lose an ongoing revenue stream." According to TP&W, it will be able to demonstrate that the "Canton to Hollis line has been undervalued," Petition To Stay at 8, and thus, because of this loss



of an alleged new revenue stream, (a) “revitalization of the Canton to Hollis . . . is also in danger;” (b) potential customers will question whether TP&W “will be able to fulfill any agreement with a shipper;” and (c) TP&W will “lose an opportunity to substantially improve the rail line between Canton and Hollis.” *Id.*, at 9. None of these claims has any merit.

First, the Decision did not put a “contract” with the new shipper in danger.

. See Exhibit 1. Accordingly, there is no “ongoing revenue stream” that would be lost to TP&W. Furthermore, even if there were such a lost revenue stream and the Board undervalued the Line (which it did not because, at most, the alleged revenue is highly speculative), the dispute is simply over what amount of money TP&W is entitled to. In other words, in TP&W’s view, it didn’t get enough money for the Line and wants more. Yet, precedent is clear:

[E]conomic loss does not in itself constitute irreparable harm. Injuries in terms of money, time, and energy necessarily expended in the absence of a stay are not enough; and the possibility that adequate compensatory or other corrective relief will be available at a later date weighs heavily against a claim of irreparable harm.

*Seaboard System Railroad, Inc. – Abandonment – In Boone, Carroll, Clinton, Hamilton and Marion Counties, IN*, Docket No. AB-55 (Sub-No. 94), 1985 ICC LEXIS 429 at \*2 (ICC May 3, 1985) (“*Seaboard*”).

Assuming TP&W was correct in all of its arguments, a stay is still not justified because “other corrective relief will be available at a later date.” Indeed, TP&W’s petition specifically states that the currently-scheduled closing date – January 26, 2005 - “is sufficient time for the Board to correct the errors in its decision.” While KJRY does not agree with TP&W that the decision requires correction, KJRY would at least agree that if correction were required, it could

be accomplished without changing the closing deadline and subsequent deadlines established by the Board.

Second

The loss of this speculative revenue stream does not constitute irreparable harm. To justify a stay, the alleged injury must "be both certain and great. It cannot be theoretical but must be actual." *Seaboard* at \*2. In fact, the injury to TP&W must be "of such imminence that there is a 'clear and present' need for equitable relief to prevent irreparable harm." *Ashland Oil, Inc. v. FTC*, 409 F.Supp. 297, 307 (D.D.C.), *aff'd*, 548 F.2d 977 (D.C. Cir. 1976) (citations omitted). See also *Iowa Terminal Railroad Co. – Abandonment – In Cerro Gordo And Floyd Counties, IA; In The Matter Of An Offer Of Financial Assistance; Iowa Terminal Railroad Co. – Abandonment Exemption – In Cerro, Gordo and Floyd Counties, IA*, Docket No. AB-269 (Sub-No. 1X), 1987 ICC LEXIS 388 at \* 4 (ICC March 24, 1987) ("[S]peculative allegations fall far short of demonstrating irreparable harm."). TP&W has failed this test.

Finally, if TP&W would in fact be damaged at all as a result of the Decision, such damage is entirely self-inflicted. It is TP&W's behavior over the past four years, not the Decision, that has prevented TP&W from contracting to provide new service. In fact, when TP&W began negotiating with the putative new shipper, it did so almost a year *after* KJRY filed its feeder line application. TP&W was clearly aware at that time that KJRY's application to acquire the Line from TP&W could be granted. If there is a credibility gap with shippers, it is

TP&W's actions, not the Decision, that have caused that gap. The Decision merely confirmed the obvious – TP&W has been attempting for years to shed this Line and has had no desire to provide service over it.

UTU-IL claims irreparable harm because sale of the Line to KJRY “would be a loss of work for TP&W employees.” This claim also fails. There are no lost job opportunities for which TP&W's employees will suffer “imminent” and “great” harm because TP&W employees have performed little or no work on the Line for almost four years. In fact, these TP&W employees benefit from the Board's Decision because it provides for continued service on the Line and accords them a hiring priority with KJRY that would not exist but for the Board's Decision. Since these employees have lost no work and instead have gained a work opportunity from the Decision, they are unharmed by the Board's Decision.<sup>3</sup>

**IV. A Stay Would Harm KJRY and The Shippers That Need Its Service And Thus Would Be Contrary To The Public Interest**

UTU-IL makes no effort at all to discuss the effect of its requested stay on other parties. Instead, it offers merely a single conclusory sentence that recites the *WMATC* standard it must meet, without offering any information to meet that standard. TP&W, meanwhile, contends that KJRY would benefit from a stay by not having to close the transaction and later pay TP&W an increased amount for the property. TP&W's contentions are fanciful at best. First,

, there is no basis for a  
changed valuation of the Line and no basis for concluding that the public would benefit from a

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<sup>3</sup> Even if some TP&W employees in fact did some minimal work on the Line in the past 4 years, the loss of such minimal work hardly constitutes irreparable harm. *See generally Wisconsin & Southern Railroad Co.-Acquisition Exemption-Iowa, Chicago & Eastern Railroad Corporation*, STB Finance Docket No. 34464, Slip op. at 2 (STB served July 30, 2004) (waiving even the requisite 60-day advance notice to labor applicable to the transaction because only 2 employees were affected by the sale and each spent less than 0.5% of their time on the involved line).

stay. Second, TP&W has conceded that its allegations of errors in the Decision can be resolved by the Board within the current schedule, eviscerating TP&W's own assertion that it will suffer irreparable harm. Finally, TP&W's statement completely ignores all of the online and overhead shippers who supported KJRY's Application and who are anxiously awaiting resumption of service. It is these shippers who will be harmed the most by a grant of a stay, not TP&W.

Likewise, it is not in the public interest to grant a stay. As the Board concluded in its Decision, the Line has effectively been without service for nearly four years. The longer closing on the sale is delayed, the harder it will be to win back the shippers and the more money will have to be expended to bring the Line into suitable operating condition. With rehabilitation work already complicated by prospective winter weather, delaying the rehabilitation will complicate the needed track work. Indeed, KJRY believes that the public interest would be best served if TP&W were to allow KJRY now, before snowfalls occur, to survey the condition of the Line and assess needed work so that the track rehabilitation can proceed promptly after closing. Unfortunately, TP&W has consistently refused KJRY any access to the track.

### **CONCLUSION**

The TP&W and UTU-IL stay petitions should be denied. Neither party shows a substantial likelihood of prevailing on its prospective reconsideration petition. Neither party proves that they would be harmed at all, let alone irreparably harmed, in the absence of a stay. UTU-IL does not even attempt to discuss the effect of a stay on other parties or the public interest, while TP&W's claims completely ignore the harm to the existing online and overhead shippers if a stay were issued.

TP&W's stay request is just another part of a pattern of behavior by TP&W that has delayed and delayed and delayed restoration of service on the Line, contrary to the public

interest. TP&W pursued this pattern by the SF&L sale and afterwards in this case by filing two unauthorized petitions to reject KJRY's Application; by appealing the denial of those petitions; by requesting that the proceeding be held in abeyance; and by filing new evidence well after the close of the procedural schedule. All of these actions have delayed resolution of this proceeding, while online and overhead shippers continued without service and while the track continued to deteriorate. These delays have been contrary to the public interest, and should not be exacerbated by granting the pending stay requests. In the end, the public interest is best served by denying the stay.

Respectfully submitted,



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Attorneys for Keokuk Junction Railway Co.

November 12, 2004

**CERTIFICATE OF SERVICE**

I hereby certify that on November 12, 2004, I have caused either a Public Version or a Highly Confidential Version of the foregoing Reply of Keokuk Junction Railway Co. To The Petitions of Toledo, Peoria and Western Railway Corporation and UTU-Illinois Legislative Board for Stay of the Board's October 28, 2004 Decision to be served by courier on:

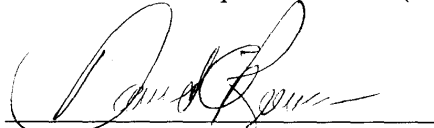
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**PUBLIC VERSION**  
**BEFORE THE**  
**SURFACE TRANSPORTATION BOARD**

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**FINANCE DOCKET NO. 34335**

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**KEOKUK JUNCTION RAILWAY CO.**  
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**REPLY OF KEOKUK JUNCTION RAILWAY CO. TO THE PETITIONS OF TOLEDO,**  
**PEORIA AND WESTERN RAILWAY CORPORATION AND UTU-ILLINOIS**  
**LEGISLATIVE BOARD FOR STAY OF THE BOARD'S OCTOBER 28, 2004 DECISION**

**EXHIBIT 1**

[Redacted]